

# EXHIBIT 11

Volume I  
Pages 1 to 102  
Exhibits None

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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:  
SUSANNA MIRKIN and BORIS :  
MIRKIN, Individually and on :  
Behalf of All Others :  
Similarly Situated, : Civil Action  
Plaintiffs, : No. 18 Civ. 2949  
: (ARR) (RER)  
vs. :  
:  
XOOM ENERGY, LLC; and XOOM :  
ENERGY NEW YORK, LLC, :  
Defendants. :  
- - - - -X

VIDEOTAPED DEPOSITION OF DERYA ERYILMAZ,  
Ph.D., a witness called by the Defendant, taken  
pursuant to the Federal Rules of Civil Procedure,  
before Alexander K. Loos, Registered Diplomat  
Reporter and Notary Public in and for the  
Commonwealth of Massachusetts, at the Offices of  
Veritext Legal Solutions, 101 Arch Street, Suite  
650, Boston, Massachusetts, on Tuesday, November 15,  
2022, commencing at 10:25 a.m.

PRESENT:

Wittels McInturff Palikovic  
(By Steven L. Wittels, Esq.; Steven D.  
Cohen, Esq. (Via videoconference); and  
Ethan D. Roman, Esq. (Via videoconference))  
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for the Plaintiffs.

<p>1 BY MR. MATTHEWS:  2 Q. So what does a "big discrepancy" mean to  3 you in that context?  4 MR. WITTELS: Objection to form.  5 THE WITNESS: If the XOOM's rates --  6 charged rate is not very -- is not equal or very  7 close to actual and estimated supply costs, then --  8 then there's a discrepancy.  9 BY MR. MATTHEWS:  10 Q. I understand.  11 But I'm -- I'm trying to -- to get you to  12 tell me --  13 A. Uh-huh.  14 Q. -- what "very close to" means.  15 Does it mean 20 percent higher?  16 MR. WITTELS: Objection. I think she's  17 told you.  18 THE WITNESS: So I guess -- let me step  19 back and explain.  20 So if it says "based on XOOM's actual and  21 estimated supply costs," then, you know, they  22 convert this into a rate, right? So XOOM's costs  23 should be not -- XOOM's rates should be very, very  24 close to -- when you're converting this into a rate,</p> <p style="text-align: right;">Page 38</p>	<p>1 hour. And the cost is basically a more gross term.  2 So you take that cost, divide it by the  3 amount of usage, and you get a dollar per unit  4 basis. So that is actually -- the cost is driving  5 the rate.  6 So that means it shouldn't be far away from  7 what the cost is presented. All you do is you take  8 that cost and convert it into a per-unit basis. So  9 therefore what you have is an actual and estimated  10 cost is your main driver of what you obtain as a  11 rate. So you transform into a rate, per-unit basis.  12 So that's why I am defining, when you say  13 "based on," it should be very close to the actual  14 and estimated supply costs, because that's driven  15 by -- that's one of the key inputs to drive the  16 rate.  17 Q. Does "very close to" mean "equal to"?  18 MR. WITTELS: Objection, asked and  19 answered.  20 BY MR. MATTHEWS:  21 Q. On a per-dollar per-unit basis?  22 MR. WITTELS: Objection.  23 THE WITNESS: As I mentioned, even if it's  24 not the actual equal, but it should be super close</p> <p style="text-align: right;">Page 40</p>
<p>1 that should be very close to the actual and  2 estimated supply costs that presented in their data  3 sets.  4 BY MR. MATTHEWS:  5 Q. Okay. If the rate was ten percent higher,  6 in your opinion, would that still be very close to  7 actual and estimated supply costs?  8 A. No. Then that would be still there's --  9 that is -- that is still not the actual and  10 estimated supply cost. It's above that.  11 Q. I understand. I'm not good at math, but I  12 know that.  13 But I'm asking -- you said it had to be  14 "very close to." And you distinguish that from  15 being exactly equal to, right?  16 A. Uh-huh.  17 Q. Do you agree with that?  18 MR. WITTELS: Objection. Objection to  19 form.  20 THE WITNESS: So -- okay. Let me explain  21 it this way:  22 So rate is, like, dollar per megawatt hour,  23 right? So when we are charged by utilities or  24 energy companies, we are charged dollar per megawatt</p> <p style="text-align: right;">Page 39</p>	<p>1 to, very close to what the actual and estimated  2 supply cost is.  3 BY MR. MATTHEWS:  4 Q. Is that two percent more? Is it five  5 percent more?  6 What does "very close to" mean to you? You  7 are a mathematician and a data analytics --  8 A. Sure.  9 Q. -- specialist.  10 So I would like to know, in your view,  11 mathematically, how much more could the rate be than  12 actual and estimated supply costs on a  13 dollar-per-unit basis and still fall within your  14 definition of "very close to."  15 MR. WITTELS: Objection. Objection to  16 form.  17 THE WITNESS: I guess -- so as I mentioned  18 that when you are transforming the rate from cost,  19 you are taking a lump sum and converted into a rate.  20 So then there's no, like, specific percentage I can  21 tell you that it should be X percent higher. It  22 should be based on whatever the cost is and you  23 convert that into a rate per-unit basis.  24 So that means you're taking the actual and</p> <p style="text-align: right;">Page 41</p>

<p>1 estimated supply costs in order to derive your rate. 2 So that means there's no specific, you know, magic 3 percentage that I can tell you that, even if it's 4 within that percentage, I can't tell you that. But 5 that -- to me, when it's based on you take a value 6 and convert that into a per-unit basis, then you 7 take that actual and estimated supply cost as it is, 8 and then you convert that into a rate. 9 BY MR. MATTHEWS: 10 Q. Uh-huh. 11 A. So that's how you would do it. And that's 12 why it should be very close to, I guess. 13 Q. And that's the calculation you did under 14 model one, right? 15 A. That's -- that's correct. 16 Q. And you are going to tell the ladies and 17 gentlemen of the jury that if the rate charged was 18 anything above the supply costs under that 19 calculation, that XOOM should have to give that 20 money back, right? 21 A. Yes. 22 Q. Okay. Which would mean that, in your view, 23 "based on actual and estimated supply costs" under 24 model one means equal to supply costs --</p> <p>Page 42</p>	<p>1 BY MR. MATTHEWS: 2 Q. Okay. Thanks. 3 And in your opinion, "based on actual and 4 estimated supply costs" also means that XOOM cannot 5 consider anything other than actual and estimated 6 supply costs when setting its rates, correct? 7 A. Again, I would look at the contract. It 8 says: 9 "... based on actual and estimated 10 supply costs, which may include, but not 11 limited to prior period adjustments" -- 12 THE REPORTER: "Which may include, but 13 not..." 14 MR. WITTELS: Slow down so he can take -- 15 the reporter has to take it. 16 THE WITNESS: Oh, I'm sorry. 17 Which -- I guess: 18 "... which may include, but not be 19 limited to prior period adjustments, 20 inventory and balancing costs." 21 So to your question, it may include these, 22 but -- may include these, but other than that, yes, 23 it should be based on actual and estimated supply 24 costs.</p> <p>Page 44</p>
<p>1 MR. WITTELS: Objection. 2 BY MR. MATTHEWS: 3 Q. -- right? 4 MR. WITTELS: Objection. 5 THE WITNESS: It's -- I guess exact equal 6 to definition is -- doesn't fit here because, as I 7 mentioned, rate is a transformation of cost. 8 So what -- essentially I'm taking this 9 actual and estimated supply costs and converting 10 into a rate. That's why it cannot be 1:1 equal, but 11 it has to be very close to what is presented in the 12 actual cost. 13 BY MR. MATTHEWS: 14 Q. It's effectively 1:1 equal, right? That's 15 what model one seeks to do -- 16 MR. WITTELS: Objection. 17 BY MR. MATTHEWS: 18 Q. -- right? 19 MR. WITTELS: Please don't interrupt her. 20 Objection. 21 THE WITNESS: Model one takes the 22 discrepancy that we found in the rate versus the 23 XOOM's actual and estimated supply costs. That's 24 correct.</p> <p>Page 43</p>	<p>1 BY MR. MATTHEWS: 2 Q. And nothing else? 3 A. Uh-uh. No. 4 Q. Correct? 5 A. Correct. 6 Q. Okay. Let me hand you what has previously 7 been marked as Exhibit 5 to -- which is a copy of 8 the -- 9 A. Complaint. 10 Q. -- first amended class action complaint. 11 And I also hand you what was previously marked as 12 Exhibit 6, which is an exhibit to that class action 13 complaint -- 14 A. Right. 15 Q. -- called "market supply cost build up." 16 Have you seen these documents before? 17 A. Yes. 18 Q. Did you prepare the market supply cost 19 build up that is Exhibit 6? 20 A. This one? No. I was not part of this case 21 at the time. 22 Q. Okay. There we go. 23 And you would disagree with -- let me -- 24 let me find the paragraph.</p> <p>Page 45</p>

<p>1 A. That is correct, yes.</p> <p>2 Q. But when you did that, you took out the</p> <p>3 margin, right, for model one?</p> <p>4 A. For model one, yes.</p> <p>5 By looking at the contract, it says it</p> <p>6 should be based on actual and estimated supply</p> <p>7 costs. So we prepared method one to show that,</p> <p>8 whether it's based on actual and estimated supply</p> <p>9 costs.</p> <p>10 Q. You had the contract at the time that the</p> <p>11 market supply cost build up was prepared, right?</p> <p>12 A. As I mentioned, I was not part of the case.</p> <p>13 Q. CRA did.</p> <p>14 A. CRA was part of it. But when this was</p> <p>15 prepared, I didn't review this. So, I mean, I don't</p> <p>16 know if that's your question. I reviewed this once</p> <p>17 I was involved with this case.</p> <p>18 Q. Was it your decision, personally, to remove</p> <p>19 margin from any sort of calculation of overcharge?</p> <p>20 A. It was our -- you know, Seabron and I have</p> <p>21 decided to build model one based on what the</p> <p>22 contract says that would be the appropriate method.</p> <p>23 But if we would -- we anticipated, you know, the</p> <p>24 court may say a margin is appropriate for this case.</p> <p>Page 50</p>	<p>1 and they would assume it would be based on actual</p> <p>2 and estimated supply costs.</p> <p>3 But an average customer wouldn't know what</p> <p>4 a "supply cost" means, but it's an</p> <p>5 energy-industry-specific terminology. So that's</p> <p>6 what they -- from what they read, they would think</p> <p>7 that they would be based on actual and estimated</p> <p>8 supply costs, and they would -- that's what they</p> <p>9 would be charged at.</p> <p>10 BY MR. MATTHEWS:</p> <p>11 Q. And you think an average customer -- I'm</p> <p>12 focused on the phrase "based on" -- would think that</p> <p>13 "based on" means equal to?</p> <p>14 MR. WITTELS: Objection. It's about ten</p> <p>15 times you've asked it.</p> <p>16 THE WITNESS: As I mentioned before, I</p> <p>17 think "based on" in this context is we are having a</p> <p>18 cost, converting into a rate, so it should be very</p> <p>19 close to -- to the -- to the actual and estimated</p> <p>20 supply costs.</p> <p>21 BY MR. MATTHEWS:</p> <p>22 Q. Converting it directly into a rate --</p> <p>23 A. Rate.</p> <p>24 Q. -- with no margin added, correct?</p> <p>Page 52</p>
<p>1 Q. Uh-huh.</p> <p>2 A. Then we came up with an alternative method</p> <p>3 to show what the overcharges would look like if</p> <p>4 there was a margin considered.</p> <p>5 Q. Uh-huh.</p> <p>6 A. So that's the approach that we presented in</p> <p>7 method two.</p> <p>8 Q. Uh-huh.</p> <p>9 But you believe, looking back at Exhibit 2,</p> <p>10 the contract terms --</p> <p>11 A. Yes.</p> <p>12 Q. -- that an average customer would read the</p> <p>13 pricing provision that's listed in the box at the</p> <p>14 top of the document?</p> <p>15 A. Uh-huh.</p> <p>16 *Q. And would conclude that they are going to</p> <p>17 get electricity from XOOM at cost?</p> <p>18 MR. WITTELS: Can you repeat the question?</p> <p>19 Read back the question, please.</p> <p>20 *(Record read)</p> <p>21 MR. WITTELS: Objection.</p> <p>22 THE WITNESS: Well, the customer will get</p> <p>23 this agreement; and they would read that it would be</p> <p>24 based on XOOM's actual and estimated supply costs,</p> <p>Page 51</p>	<p>1 A. Yes. No margin, because it's not listed in</p> <p>2 this.</p> <p>3 Q. You think that's what an average customer</p> <p>4 would believe reading that language?</p> <p>5 A. In this context, in this contract, they</p> <p>6 would read this and think that it would be based on</p> <p>7 actual and estimated supply costs.</p> <p>8 MR. WITTELS: Why are you laughing? You</p> <p>9 can go to the court and laugh, too. I don't think</p> <p>10 you should be laughing at witnesses.</p> <p>11 MR. MATTHEWS: If this is the opinion that</p> <p>12 they want to present in this case that "based on"</p> <p>13 means equal to, they should say so. I don't know</p> <p>14 why that's difficult if that is the opinion that</p> <p>15 they're advancing.</p> <p>16 MR. WITTELS: I think she's asked it --</p> <p>17 answered your questions appropriately, and I don't</p> <p>18 know why you're laughing. But we'll see what the</p> <p>19 court thinks.</p> <p>20 BY MR. MATTHEWS:</p> <p>21 Q. Dr. Eryilmaz, you believe that an average</p> <p>22 customer would read that language "based on actual</p> <p>23 and estimated supply costs" and would believe that</p> <p>24 XOOM's rate would be a direct conversion of its</p> <p>Page 53</p>

<p>1 you mean by that?</p> <p>2 Q. Okay. You're not familiar with that</p> <p>3 concept in the -- in the retail energy world?</p> <p>4 A. No. I have not worked with indexed rate</p> <p>5 data.</p> <p>6 Q. Whether you've worked with indexed rate</p> <p>7 data or you haven't, you have no understanding of</p> <p>8 what an indexed rate is?</p> <p>9 A. If you define -- if you give me the</p> <p>10 definition, I might understand, but I don't know.</p> <p>11 Q. Well, I'm not trying to --</p> <p>12 A. I don't know.</p> <p>13 Q. -- force an understanding on you.</p> <p>14 You don't have an understanding --</p> <p>15 A. No, I don't.</p> <p>16 Q. -- of what an indexed rate is?</p> <p>17 A. Uh-uh.</p> <p>18 Q. Is -- how many cases -- let me back up.</p> <p>19 You've been retained as a potential</p> <p>20 testifying expert witness in this case --</p> <p>21 A. Right.</p> <p>22 Q. -- correct?</p> <p>23 And have you been retained as a potential</p> <p>24 testifying expert in other cases before?</p> <p>Page 62</p>	<p>1 MR. WITTELS: Objection.</p> <p>2 THE WITNESS: I don't know, should or not.</p> <p>3 BY MR. MATTHEWS:</p> <p>4 Q. Well --</p> <p>5 MR. WITTELS: Let her answer.</p> <p>6 THE WITNESS: Um.</p> <p>7 MR. MATTHEWS: I didn't mean to cut you</p> <p>8 off.</p> <p>9 MR. WITTELS: You cut her off.</p> <p>10 MR. MATTHEWS: Well, you're</p> <p>11 characterizing it that way, but --</p> <p>12 MR. WITTELS: You started talking when she</p> <p>13 was --</p> <p>14 MR. MATTHEWS: Well, let me ask.</p> <p>15 Q. Do you have more to say?</p> <p>16 Please go ahead.</p> <p>17 A. I mean, to your question, I don't know if</p> <p>18 they lose money or they should lose money.</p> <p>19 There was a contract, and it says that the</p> <p>20 rate is based on actual and estimated supply costs.</p> <p>21 And based on this contract, that's the rates that --</p> <p>22 should be based on that.</p> <p>23 And if -- margin is not listed here, so,</p> <p>24 therefore, this is the way they formed their</p> <p>Page 64</p>
<p>1 A. No.</p> <p>2 Q. This is the first?</p> <p>3 A. This is the first one.</p> <p>4 Q. You understand that XOOM's a for-profit</p> <p>5 business in a deregulated, or semi-deregulated,</p> <p>6 competitive market, right?</p> <p>7 A. Yes.</p> <p>8 MR. WITTELS: Objection.</p> <p>9 BY MR. MATTHEWS:</p> <p>10 Q. Why doesn't XOOM get to seek a profit under</p> <p>11 this sales contract?</p> <p>12 A. The sales contract did not mention margin</p> <p>13 in their statement, so that's why.</p> <p>14 Q. So, in your opinion, XOOM just entered into</p> <p>15 a bad contract?</p> <p>16 A. Yes. I mean, they are -- I guess they</p> <p>17 are -- the way they framed what their rates are</p> <p>18 going to be based on is these factors, and margin is</p> <p>19 not listed here, so...</p> <p>20 Q. And, in your view, that will result in XOOM</p> <p>21 losing money?</p> <p>22 MR. WITTELS: Objection.</p> <p>23 BY MR. MATTHEWS:</p> <p>24 Q. Or should result in XOOM losing money?</p> <p>Page 63</p>	<p>1 contract, and that's the rate should be.</p> <p>2 Q. Okay. We talked about under model one --</p> <p>3 A. Uh-huh.</p> <p>4 Q. -- the supply cost that was used in that</p> <p>5 calculation is the -- the total cost column that</p> <p>6 came from the rate-setting workbooks, right?</p> <p>7 A. Right.</p> <p>8 Q. And you understand that XOOM, and other</p> <p>9 ESCOs, have certain fixed costs that are not part of</p> <p>10 those supply costs, correct?</p> <p>11 A. Correct. Fixed costs are not considered a</p> <p>12 supply cost.</p> <p>13 Supply costs are pretty specific, and fixed</p> <p>14 costs, every business may have fixed cost. It's</p> <p>15 normal to have a fixed cost as a business.</p> <p>16 Q. And you've reviewed XOOM witness testimony</p> <p>17 that XOOM has fixed costs that are not included in</p> <p>18 the supply cost reported in the rate-setting</p> <p>19 workbook, right?</p> <p>20 A. I don't remember the specific person or the</p> <p>21 witness, but I remember that he testified -- he --</p> <p>22 his transcript included a definition for a fixed</p> <p>23 cost, I think. It was Loehde or -- I don't</p> <p>24 remember.</p> <p>Page 65</p>


<p>1 THE REPORTER: It was what?</p> <p>2 THE WITNESS: It was Loehde. I don't</p> <p>3 remember the witness' last name. Sorry.</p> <p>4 BY MR. MATTHEWS:</p> <p>5 Q. But you have some recollection -- I'm not</p> <p>6 asking you to identify the witness, but you have</p> <p>7 some recollection of XOOM witnesses testifying to</p> <p>8 the fact that XOOM has fixed costs that are not</p> <p>9 included in the supply costs reported in the</p> <p>10 rate-setting workbooks, right?</p> <p>11 A. I remember, like, a witness defining a</p> <p>12 fixed cost; but I don't really remember, like,</p> <p>13 whether it was included in the supply costs or not</p> <p>14 at this moment. I mean, if it's in front of me, I</p> <p>15 can take a look at it, but I don't remember the</p> <p>16 specific wording.</p> <p>17 Q. When you prepared the calculation for model</p> <p>18 one, did you take into account XOOM's fixed costs?</p> <p>19 A. No. I actually just took the supply cost</p> <p>20 related information and calculated the actual and</p> <p>21 estimated supply costs as produced by XOOM.</p> <p>22 Q. So if XOOM did not include fixed costs in</p> <p>23 the supply costs reported in the rate-setting</p> <p>24 workbook --</p> <p>Page 66</p>	<p>1 said?</p> <p>2 MR. WITTELS: Objection.</p> <p>3 THE WITNESS: I guess I thought you were</p> <p>4 saying that supply costs are -- you know, may -- you</p> <p>5 know, I don't know.</p> <p>6 I guess the way I understand it from what</p> <p>7 you've described is have I considered supply cost</p> <p>8 plus the other costs? But I did not. I just took</p> <p>9 the components of the supply cost, and I added them</p> <p>10 up -- I mean they were all, like, in a total supply</p> <p>11 column -- and calculated the excess -- excess</p> <p>12 charges.</p> <p>13 Q. Understood.</p> <p>14 So if fixed costs -- if XOOM has fixed</p> <p>15 costs in addition to the reported supply costs --</p> <p>16 A. Uh-huh.</p> <p>17 Q. -- then the only place that those fixed</p> <p>18 costs appear in your calculation under model one</p> <p>19 would be in the overcharge itself?</p> <p>20 MR. WITTELS: Objection.</p> <p>21 BY MR. MATTHEWS:</p> <p>22 Q. Correct?</p> <p>23 MR. WITTELS: Objection.</p> <p>24 THE WITNESS: I mean, I cannot tell from</p> <p>Page 68</p>
<p>1 A. Uh-huh.</p> <p>2 Q. -- then those fixed costs would be included</p> <p>3 in what you have characterized as an "overcharge"</p> <p>4 under model one, right?</p> <p>5 MR. WITTELS: Objection.</p> <p>6 THE WITNESS: As I mentioned, those fixed</p> <p>7 costs are not considered as part of supply costs;</p> <p>8 therefore, they are not included in the model.</p> <p>9 BY MR. MATTHEWS:</p> <p>10 Q. They're not --</p> <p>11 A. Included my calculation. I only considered</p> <p>12 supply -- the components of the supply cost.</p> <p>13 Q. They would not be included in the supply</p> <p>14 cost portion of your calculation, correct?</p> <p>15 MR. WITTELS: Objection.</p> <p>16 THE WITNESS: Again, I only considered the</p> <p>17 supply cost components. Because, you know, we are</p> <p>18 interested in looking at the supply costs and what</p> <p>19 the rate has been charged by XOOM.</p> <p>20 BY MR. MATTHEWS:</p> <p>21 Q. Yeah.</p> <p>22 A. So anything beyond supply cost is not</p> <p>23 included in the supply cost column.</p> <p>24 Q. Okay. How is that different from what I</p> <p>Page 67</p>	<p>1 just looking at the data what that excess charge is</p> <p>2 included. They do not define -- XOOM did not define</p> <p>3 where that excess charge came from.</p> <p>4 There was no calculation providing that,</p> <p>5 that included the fixed cost. They -- there was no</p> <p>6 calculation that showed that rate included fixed</p> <p>7 costs as I reviewed the data. The data came in as</p> <p>8 rate versus the total cost of the components of the</p> <p>9 supply cost, or the total cost, and then the</p> <p>10 difference. I cannot tell what is included in the</p> <p>11 discrepancy. It was not described in the data.</p> <p>12 BY MR. MATTHEWS:</p> <p>13 Q. Okay. Model two.</p> <p>14 A. Uh-huh.</p> <p>15 Q. Model two, as we covered earlier, is</p> <p>16 essentially the same as model one, except that it</p> <p>17 allows XOOM to recover the same gross margin on</p> <p>18 variable-rate customers that XOOM's documents</p> <p>19 reported it recovered for fixed-rate customers,</p> <p>20 right?</p> <p>21 A. Right.</p> <p>22 Again, we -- exactly. The method one plus,</p> <p>23 if there was a margin -- you know, there's -- it</p> <p>24 doesn't say in the contract that there should be a</p> <p>Page 69</p>



<p>1 margin.</p> <p>2 But if -- suppose there is a margin. We</p> <p>3 basically provided that as an example to show, you</p> <p>4 know, what would be the charge look like.</p> <p>5 And looking at the margin reports, at least</p> <p>6 the margin that should be charged should be equal to</p> <p>7 the fixed-rate customers, which, you know, XOOM has</p> <p>8 made -- you know, has charged its fixed-rate</p> <p>9 customers, too, a margin. So there was that rate</p> <p>10 taken to calculate the overcharges.</p> <p>11 Q. And the purpose of -- of illustrating that</p> <p>12 second model was in case the court or the jury</p> <p>13 decides that some recovery of margin is</p> <p>14 appropriate --</p> <p>15 A. Yes.</p> <p>16 Q. -- right?</p> <p>17 But you don't believe that that reading of</p> <p>18 the contract is appropriate, right?</p> <p>19 A. No. By the read of the contract, it didn't</p> <p>20 specify margin, this contract, so -- and that's why</p> <p>21 I don't believe, yes.</p> <p>22 Q. So, in your view, if a contract doesn't</p> <p>23 specify that the company will recover margin, then</p> <p>24 the company is not allowed to recover margin?</p> <p>Page 70</p>	<p>1 BY MR. MATTHEWS:</p> <p>2 Q. If -- if an ESCO does not specify in a</p> <p>3 variable-rate contract that the rate will include</p> <p>4 margin, then, in your view, that ESCO cannot seek to</p> <p>5 recover margin --</p> <p>6 MR. WITTELS: Objection.</p> <p>7 BY MR. MATTHEWS:</p> <p>8 Q. -- on its variable rate?</p> <p>9 MR. WITTELS: She didn't say that.</p> <p>10 Objection.</p> <p>11 THE WITNESS: Is that a hypothetical</p> <p>12 example that -- are we just talking about X ESCO</p> <p>13 here, or --</p> <p>14 BY MR. MATTHEWS:</p> <p>15 Q. Yes.</p> <p>16 A. Is that a hypothetical example?</p> <p>17 Q. Yes.</p> <p>18 A. If -- again, I mean, I am looking at this</p> <p>19 contract. If another X ESCO was giving me a</p> <p>20 contract that doesn't list the margin, yes, then I</p> <p>21 would be looking at the specifics that they have put</p> <p>22 in the contract to determine their rates.</p> <p>23 Q. Understood. Thank you.</p> <p>24 In connection with this case, you have not</p> <p>Page 72</p>
<p>1 MR. WITTELS: Objection.</p> <p>2 THE WITNESS: I mean, this is -- I mean,</p> <p>3 I'm not a contract expert, but its contract -- it</p> <p>4 says -- it should be charging what it says in the</p> <p>5 contract. As -- I mean, you know, if -- what</p> <p>6 happens, for example, if a customer doesn't, you</p> <p>7 know, oblige with their contract? There's</p> <p>8 implications for that, too. So if it doesn't say in</p> <p>9 the contract, yes, that shouldn't be charged.</p> <p>10 BY MR. MATTHEWS:</p> <p>11 Q. If it doesn't specify a margin, it</p> <p>12 shouldn't be charged?</p> <p>13 MR. WITTELS: Objection.</p> <p>14 THE WITNESS: Yes.</p> <p>15 BY MR. MATTHEWS:</p> <p>16 Q. And that's -- to be clear, that's your view</p> <p>17 more broadly? I'm not just asking about this</p> <p>18 specific XOOM contract --</p> <p>19 A. Uh-huh.</p> <p>20 Q. -- correct?</p> <p>21 MR. WITTELS: Objection.</p> <p>22 THE WITNESS: I guess -- what's the</p> <p>23 question?</p> <p>24</p> <p>Page 71</p>	<p>1 done any analysis of how XOOM's variable rates</p> <p>2 compared to the utilities' rates, correct?</p> <p>3 A. We -- I think Figure 1 in our report does</p> <p>4 present a -- like an illustration or -- like</p> <p>5 presents the data that shows the total cost versus</p> <p>6 the utility rate.</p> <p>7 Q. Shows how the two moved over the same</p> <p>8 period of time?</p> <p>9 A. Exactly.</p> <p>10 Q. Okay. But you're not offering an opinion</p> <p>11 in this case that under the sales agreement, that</p> <p>12 XOOM was not permitted to charge more than the</p> <p>13 utility, right?</p> <p>14 MR. WITTELS: Objection.</p> <p>15 THE WITNESS: No. I mean, XOOM -- I mean</p> <p>16 our basis was the actual and estimated supply cost,</p> <p>17 whatever it should be charging.</p> <p>18 BY MR. MATTHEWS:</p> <p>19 Q. And the utility's rate is irrelevant to</p> <p>20 that consideration, right?</p> <p>21 MR. WITTELS: Objection.</p> <p>22 THE WITNESS: It is irrelevant for this</p> <p>23 contract. But we showed -- you know, our figure</p> <p>24 presents, you know, whether the total cost and</p> <p>Page 73</p>



<p>1 utility rates, how they compare. We presented that</p> <p>2 in our report.</p> <p>3 BY MR. MATTHEWS:</p> <p>4 Q. Yes. But the XOOM -- that's XOOM's</p> <p>5 reported supply costs compared to the utility's</p> <p>6 rate, right?</p> <p>7 A. Utility, yeah.</p> <p>8 Q. But you don't believe that a comparison of</p> <p>9 XOOM's rate to the utility's rate is relevant here?</p> <p>10 MR. WITTELS: Objection.</p> <p>11 BY MR. MATTHEWS:</p> <p>12 Q. Right?</p> <p>13 A. No. I guess we -- we -- we used that</p> <p>14 Figure 1 to show what the utility in that territory</p> <p>15 charged and what that compares to the total cost</p> <p>16 of -- of the -- of XOOM.</p> <p>17 Q. But you're not offering any sort of damage</p> <p>18 model that seeks to compare XOOM's rate to the</p> <p>19 utility's rate, right?</p> <p>20 MR. WITTELS: Objection.</p> <p>21 THE WITNESS: We provided a cross-check</p> <p>22 analysis on, you know, what would the overcharges</p> <p>23 look like if XOOM has charged utility rates instead</p> <p>24 of, you know, its total cost. So that's the</p> <p>Page 74</p>	<p>1 they had just stayed with the utility, right?</p> <p>2 MR. WITTELS: Objection.</p> <p>3 THE WITNESS: I guess that doesn't -- I</p> <p>4 mean, it's not to show that whether they better off,</p> <p>5 but it shows -- if the utility rate was charged to</p> <p>6 these customers --</p> <p>7 BY MR. MATTHEWS:</p> <p>8 Q. Uh-huh.</p> <p>9 A. -- against the rate that was -- that XOOM</p> <p>10 was charging, that would be slightly lower because,</p> <p>11 you know, the utility's rates were slightly higher</p> <p>12 than the total cost that's presented in the XOOM's</p> <p>13 rate-setting workbooks.</p> <p>14 Q. Right. I understand the purpose for which</p> <p>15 it was shown in the report.</p> <p>16 A. Uh-huh.</p> <p>17 Q. I'm asking factually, if the court awarded</p> <p>18 the damages that you have advocated for under model</p> <p>19 one, is it true that XOOM's variable-rate customers</p> <p>20 would recoup more money than they would under the</p> <p>21 damage model that you've illustrated using the</p> <p>22 utility rate?</p> <p>23 MR. WITTELS: Objection.</p> <p>24 THE WITNESS: When you say "recoup more</p> <p>Page 76</p>
<p>1 cross-check analysis that we did in our report that</p> <p>2 yielded a little bit lower damages, I think 49</p> <p>3 million, about that.</p> <p>4 BY MR. MATTHEWS:</p> <p>5 Q. Uh-huh.</p> <p>6 49 million under that model instead of 55</p> <p>7 and a half --</p> <p>8 A. Yeah.</p> <p>9 Q. -- right?</p> <p>10 A. So that was a cross-check analysis. That</p> <p>11 was not, you know, separate models.</p> <p>12 We presented two methods only. Uh-huh.</p> <p>13 Q. Right. Meaning that if customers had</p> <p>14 stayed with the utility -- I'm sorry.</p> <p>15 Meaning that if -- XOOM variable-rate</p> <p>16 customers would do better than they would have had</p> <p>17 they just stayed with the utility, right?</p> <p>18 MR. WITTELS: Objection.</p> <p>19 THE WITNESS: I don't understand when you</p> <p>20 say "better off."</p> <p>21 BY MR. MATTHEWS:</p> <p>22 Q. If -- if XOOM's variable-rate customers</p> <p>23 were awarded the damages that you have put forth</p> <p>24 under model one, they would be better off than if</p> <p>Page 75</p>	<p>1 money," is that like -- clearly, the calculation</p> <p>2 shows that utilities -- that the value that goes</p> <p>3 down to 49 million because utility's rate -- rates</p> <p>4 were slightly higher than the total cost. So the</p> <p>5 damages would be slightly lower than the method one.</p> <p>6 And when you say recouped, the customers</p> <p>7 recoup, I don't know what you mean by that.</p> <p>8 Q. Recoup, as in recover damages.</p> <p>9 A. Yeah. I mean --</p> <p>10 Q. Do you understand that?</p> <p>11 A. What is the question? I guess I'm not</p> <p>12 following the question.</p> <p>13 Q. I think we've got it.</p> <p>14 Did you do any analysis of what other ESCOs</p> <p>15 charged over the same time period?</p> <p>16 A. No.</p> <p>17 Q. And you don't know how XOOM's rates</p> <p>18 compared to other ESCOs' rates during that time?</p> <p>19 A. No. That's private information, so I</p> <p>20 wouldn't be able to.</p> <p>21 Q. What's private information?</p> <p>22 A. I mean the other ESCOs' data was not</p> <p>23 available to us, so I was not able to compare it to</p> <p>24 the other.</p> <p>Page 77</p>

<div>1 COMMONWEALTH OF MASSACHUSETTS)</div> <div>2 SUFFOLK, SS. )</div> <div>3 I, Alexander K. Loos, RDR and Notary Public in</div> <div>4 and for the Commonwealth of Massachusetts, do hereby</div> <div>5 certify that there came before me on the 15th day of</div> <div>6 November, 2022, at 10:25 a.m., the person</div> <div>7 hereinbefore named, who was by me duly sworn to</div> <div>8 testify to the truth and nothing but the truth of</div> <div>9 her knowledge touching and concerning the matters in</div> <div>10 controversy in this cause; that she was thereupon</div> <div>11 examined upon her oath, and her examination reduced</div> <div>12 to typewriting under my direction; and that the</div> <div>13 deposition is a true record of the testimony given</div> <div>14 by the witness. I further certify that I am neither</div> <div>15 attorney or counsel for, nor related to or employed</div> <div>16 by, any attorney or counsel employed by the parties</div> <div>17 hereto or financially interested in the action.</div> <div>18  ve hereunto set my hand</div> <div>19 al this 27th day of</div> <div>20</div> <div>21</div> <div>22</div> <div>23 Notary Public</div> <div>24 Commission expires 5/5/28</div> <div>Page 102</div>	
<div>1 Steven Wittles</div> <div>2 Slw@wittelslaw.com</div> <div>3 November 28, 2022</div> <div>4 RE: Mirkin vs. XOOM Energy</div> <div>5 DEPOSITION OF: Derya Eryilmaz 5544030</div> <div>6 The above-referenced witness transcript is</div> <div>7 available for read and sign.</div> <div>8 Within the applicable timeframe, 30 days, the witness</div> <div>9 should read the testimony to verify its accuracy. If</div> <div>10 there are any changes, the witness should note those</div> <div>11 on the attached Errata Sheet.</div> <div>12 The witness should sign and notarize the</div> <div>13 attached Errata pages and return to Veritext at</div> <div>14 errata-tx@veritext.com.</div> <div>15 According to applicable rules or agreements, if</div> <div>16 the witness fails to do so within the time allotted,</div> <div>17 a certified copy of the transcript may be used as if</div> <div>18 signed.</div> <div>19 Yours,</div> <div>20 Veritext Legal Solutions</div> <div>21</div> <div>22</div> <div>23</div> <div>24</div> <div>25</div> <div>Page 103</div>	